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Supreme Court, U.S.
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No. 00-1196

IN THE
Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

SHIRLEY K. ROGERS,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In its petition, Wal-Mart Stores, Inc. demonstrated that this case presents an unanswered federal question that is recurring in nature, that has eluded uniform interpretation since 1938 and that the Sixth Circuit incorrectly answered. It showed that this construction of Rule 41(d) of the Federal Rules of Civil Procedure implicates "a split of authority" in the lower courts -- as the Sixth Circuit itself recognized. Pet. App. 10a. It showed that the decision below not only differs from what "the majority of courts" have done, as the Sixth Circuit again recognized, *id.*, but also is mistaken because it innovated a clear-statement requirement for awarding attorney fees when there is none. *See Key Tronic Corp. v. United States*, 511 U.S. 809, 815 (1994) (recognizing that attorney fees may be permitted in the absence of a clear statement "if the statute otherwise evinces an intent to provide for such fees"). And it showed that the issue is important to the functioning of the lower courts and arises with considerable frequency at the trial level. Since the submission of the petition, the Chamber of Commerce of the United States has filed a brief *amicus curiae* that supports each of these points and more. Among other things, it demonstrates that "Rule 41 was specifically designed to counter the prejudice to defendants" caused by the availability of nonsuits, and that the "repetitive litigation" that the Rule tries to thwart "continues to impose significant costs on American businesses." U.S. Chamber Br. 3.

Respondent understandably takes a different tack, though not as different as one might expect. She ultimately takes issue with just one component of the petition, and offers no response to the other grounds for granting the writ.

1. At no point does respondent raise, or even hint at, a procedural obstacle to reviewing the question presented. No jurisdictional impediments exist, an appealable order is in place, and there is no independent and adequate state ground precluding review. Nor does respondent argue that the case contains any other factual or procedural impediments that

would create vehicle problems for addressing the question presented.

2. Respondent also offers no defense to the Sixth Circuit's decision on the merits. Even though the court of appeals acknowledged "that the majority of courts find that attorney fees *are available* under Rule 41(d)," Pet. App. 10a (emphasis added), respondent does not attempt to justify the lower court's decision on the merits or attempt to defend its innovation of a clear-statement requirement for determining whether the Federal Rules authorize attorney fees. *See* Pet. App. 13a ("In short, we are persuaded by the fact that Congress did not explicitly provide for attorney fees in Rule 41(d)."). Making this failure to defend the lower-court decision all the more conspicuous is the Chamber of Commerce's historical analysis regarding the meaning of Rule 41(d), U.S. Chamber 4-10, which confirms the implausibility of the appellate court's interpretation.

3. Neither does respondent counter the argument (Pet. 14-16) that this question is recurring in nature and that its resolution will provide an important litigation-management tool for the lower courts. The sheer number of lower-court decisions wrestling with the question demonstrates the necessity of resolving this issue sooner rather than later.

4. Respondent's sole disagreement with the petition instead relates to the existence of a lower-court split. This to be sure is a relevant issue, but respondent does not advance her cause in contesting it. For one, her view that the decision does not implicate a division of authority diverges from the view of the lower-court decision that she purports to be defending. In the Sixth Circuit's words: "There is a split of authority as to whether Rule 41(d) authorizes attorney fees as part of any award of 'costs.'" Pet. App. 10a. As the petition demonstrates (Pet. 4-9) and as the Chamber of Commerce has confirmed (U.S. Chamber 15), there assuredly is a mature division of lower-court authority.

For another, her challenge to the number of schools of thought implicated by the split hardly disproves the merits of the petition. In quibbling over whether *Esposito v. Piatrowski*, 223 F.3d 497 (7th Cir. 2000), represents a third school of thought on this issue or merely adheres to the view embraced by the Sixth Circuit, respondent does not offer a tenable explanation for denying the writ. Under the Court's Rules and practices, it suffices to identify a division between the lower courts over *two* competing interpretations of a statute. It has never been the rule that petitioner must establish disagreement among the lower courts over *three* competing interpretations. In contending (Resp. 2) that "there is no difference between the Sixth Circuit's and the Seventh Circuit's answers to the central question" presented, respondent thus makes an argument regarding only the number of competing schools of thought. It is not an argument that undermines the certworthiness of the petition.

For a final reason, respondent errs in suggesting that the courts of appeal have not issued decisions that conflict with the Sixth and Seventh Circuits. The fact is, the decision in this case would have come out differently in the Eighth and Tenth Circuits, and that is all that matters. In the Eighth Circuit, a trial court may award "attorney fees" under "Fed.R.Civ.P. 41(d)," and the only question on review is whether the trial court "abuse[d] its discretion" in doing so. *Evans v. Safeway Stores, Inc.*, 623 F.2d 121 (8th Cir. 1980). That *Evans* contains only a brief analysis goes not to the binding nature of the opinion but to the ease with which that determination was reached. After all, Rule 41(d) by its terms permits any award of costs that the trial court "may deem proper." In the Eighth Circuit's view, the discretionary words of the Rule made this interpretation self-evident. The decision, at all events, is binding on future Eighth Circuit panels, *see Ramsey v. Bowersox*, 149 F.3d 749, 760 (8th Cir. 1998) ("One panel of this court is bound by the decisions of other panels."), which presumably is why lower courts within the Eighth Circuit since

1980 have continued to exercise this discretion in awarding attorney fees. *See Behrle v. Olshansky*, 139 F.R.D. 370 (W.D. Ark. 1991) (awarding fees under Rule 41(d)). Likewise, in the Tenth Circuit, "the decision whether to impose costs and attorney's fees is within the discretion of the trial court" under "the language of Rule 41(d)." *Meredith v. Stovall*, 216 F.3d 1087, 2000 WL 807355, at *1 (10th Cir. June 23, 2000). This position is consistent with other Tenth Circuit decisions that have recognized the analogous authority to impose attorney fees under Rule 41(a), *see, e.g., AeroTech, Inc. v. Estes*, 110 F.3d 1523, 1528 (10th Cir. 1997), *Nolen v. Henderson Nat'l Corp.*, 986 F.2d 1428, 1993 WL 26817, at *4 (10th Cir. Feb. 5, 1993), and has been adhered to by lower courts within the circuit, *see, e.g., Wahl v. City of Wichita*, 701 F. Supp. 1530, 1533 (D. Kan. 1988); *In re Wy. Tight Sands Antitrust Cases*, 121 F.R.D. 685, 688 (D. Kan. 1987).

In contrast to these two circuits, the courts of appeal of the Sixth and Seventh Circuits believe that trial courts have no such authority. In their view, the language of Rule 41(d) precludes trial courts from generally exercising such discretion in cases like this one. Add to this the fact that the views of the Sixth and Seventh Circuits diverge from the pre-1938 common-law practice of permitting attorney-fee awards in this setting, *see Henderson v. Griffin*, 30 U.S. 151, 158 (1831), U.S. Chamber Br. 4-10 (collecting cases), and it becomes clear that the issue has been sufficiently developed to warrant review. In the final analysis, the conflict is real; the division is mature; and the issue is cleanly presented. Review is appropriate.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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